

April 30, 2012

Patrick Tang
Hercules City Attorney
492 Ninth Street, Suite 310
Oakland, CA 94607

Re: Your Request for Informal Assistance
Our File No. I-12-051

Dear Mr. Tang:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (“the Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question is general in nature and not limited to a specific governmental decision, we are treating your request as one for informal assistance.²

Please note that the Commission does not provide advice on bodies of law outside the confines of the Act. Thus, we offer no opinion on the application of other incompatible activities and conflict-of-interest laws that may apply including, but not limited to, common law conflict of interest and Government Code Section 1090.

QUESTION

Are the approximately 8 square miles of land extending into the San Pablo Bay that are within the boundaries of the City of Hercules included when determining whether the city has a geographical area of 10 square miles or less for purposes of the public generally exception for small jurisdictions in Regulation 18707.10?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSION

The geographical area of the City of Hercules consists of all land within the jurisdiction including the approximately 8 square miles of land extending into the San Pablo Bay. Accordingly, the geographical area of the city is more than 10 square miles and the public generally exception for small jurisdictions under Regulation 18707.10 does not apply.

FACTS

You are the City Attorney for the City of Hercules. Based upon the 2010 US Census, the City of Hercules has a population of 24,060. The area of surface land is 6.2 square miles. However, the city limits extend into the San Pablo Bay. Within the actual boundaries of the City of Hercules, there are approximately 8 additional square miles of land under the bay.

At this time, you are attempting to determine whether two city council members may take part in a city council decision under the public generally exception for small jurisdictions in Regulation 18707.10. While you believe the city council members qualify under all other factors enumerated in the regulation, you ask whether the land extending into the San Pablo Bay must be included when determining whether the geographical area of the city is 10 square miles or less.

ANALYSIS

In pertinent part, Regulation 18707.10 provides:

“(a) The effect of a governmental decision on the residential real property that is the domicile of a public official is not distinguishable from the effect on the public generally if all of the following conditions are met:

“(1) The jurisdiction of the public official’s agency has a population of 30,000 or less and covers a geographic area of ten square miles or less;

“(2) The public official is required to live within the jurisdiction;

“(3) The public official, if elected, has been elected in an at-large jurisdiction;

“(4) The official’s property is more than 300 feet from the boundaries of the property that is the subject of the governmental decision;

“(5) The official’s property is located on a lot not more than one-quarter acre in size or not larger than 125 percent of the median residential lot size for the jurisdiction; and

“(6) There are at least 20 other properties under separate ownership within a 500 foot radius of the boundaries of the property that is the subject of the governmental decision that are similar in value.”

In order to qualify for the public generally exception for small jurisdictions in Regulation 18707.10, an official’s residence must meet *all* six requirements under the regulation. (Regulation 18707.10(a); *Gogna* Advice Letter, A-09-171.) Assuming that all other factors have

been met, you ask whether the geographical area of the City of Hercules includes city property extending into to the San Pablo Bay for purposes of determining whether the jurisdiction is 10 square miles or less under Regulation 18707.10(a)(1).

On its face, Regulation 18707.10 provides a bright-line rule for determining when the exception applies and does not exclude bodies of water from the geographical area. While bright-line rules are advantageous in providing added clarity, this clarity often comes at the cost of forgoing the consideration of other more complicated variables that may otherwise affect the determination.

As you have presented in your request for assistance, there are valid reasons for excluding bodies of water, or any other uninhabitable area for that matter, from the geographical area when determining whether a jurisdiction is 10 square miles or less. However, it would be improper to assume that the Commission did not have equally compelling reasons for including bodies of water or other uninhabitable areas. Had the Commission been inclined to do so, it could have easily excluded bodies of water or other uninhabitable areas from the calculation within the text of the regulation. The fact that it did not elect to do so must be provided substantial deference.

It is also significant that Regulation 18707.10 provides a limited exception to the general conflict-of-interest rules allowing an official to take part in a governmental decision in which the official would otherwise be disqualified. As dictated by rules of statutory construction, we have previously advised that exceptions to general rules *must* be narrowly construed. (See *Simonian* Advice Letter, No. A-09-174, citing *Julius Goldman's Egg City v. Air Pollution Control Dept. of Ventura County* (1981) 116 Cal.App.3d 741, *Estate of Banerjee* (1978) 21 Cal.3d 527, and *Valdez v. Federal Mut. Ins. Co.* (1969) 272 Cal.App.2d 223.)

Accordingly, we are bound by the plain-language of Regulation 18707.10. Because the geographical area of the City of Hercules includes both the surface land area and that portion of the San Pablo Bay lying within the boundaries of the city, the geographical area of the city is more than 10 square miles and the public generally exception for small jurisdictions under Regulation 18707.10 does not apply.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl